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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

RICHARD K. HAMMERBECK, Plaintiff and Appellant, v. CALIFORNIA BROADCASTING, INC. et al., Defendants and Respondents.	C058795 (Super. Ct. No. 159320)

Plaintiff Richard K. Hammerbeck brought this defamation and negligence action against a news reporter, television anchor/news director, and television broadcast company (defendants) based on a news story they aired that identified him as one of the people arrested for insurance fraud at auto body shops investigated by the California Department of Insurance and the Butte and Shasta County District Attorney's Offices. He was subsequently acquitted of the charge. The trial court sustained defendants' demurrer, without leave to amend, to the plaintiff's second amended complaint and granted

defendants' special motion to strike the complaint as a strategic lawsuit against public participation (SLAPP) under Code of Civil Procedure section 425.16 (section 425.16). Judgment was entered in favor of defendants. Plaintiff appeals. We affirm the judgment.

FACTUAL BACKGROUND

The California Department of Insurance (CDI), with the assistance of the Butte and Shasta County District Attorney's Offices, conducted an undercover investigation into insurance fraud committed by automobile body shops. An undercover officer visited 68 or 69 body shops and spoke with owners and estimators at each shop. The undercover officer showed the owners/estimators a damaged car and told them the left side of the car was damaged in an accident. The officer said that damage would be covered under the officer's existing auto insurance policy. The undercover officer then asked if it would be possible for the damage on the right side of the car, unrelated to the accident, to be included on the insurance claim for the repair of the accident damage. The CDI claimed 21 body shops provided the undercover officer with a fraudulent repair estimate.

As a result of this investigation, the Shasta County District Attorney's Office charged plaintiff and 11 others with felony insurance fraud. He voluntarily surrendered to authorities and was released on his own recognizance. According to plaintiff's second amended complaint, he was ultimately acquitted of the charge at trial.

On the day of plaintiff's arrest and release, defendants aired a television news story about the investigation and arrests. The story was the lead story on the 5:30 p.m. news for Redding local channel seven. A copy of the newscast shows the following.[1]

Mike Mangas, one of the local news anchors, begins the newscast by announcing: "Nineteen people in local auto repair businesses will have to take a day off of work to go to court after they were arrested for insurance fraud. Good evening, welcome to news channel seven at five thirty. I'm Mike Mangas." As he is speaking, the photographs of a number of individuals appear on the screen, including a photograph of plaintiff. "Golden Auto Body" is printed at the top of plaintiff's photo and his name is listed below it.

Mangas's coanchor continues: "I'm Jennifer Scarborough. --- In the last four months, undercover investigators from Shasta and Butte Counties visited sixty-eight auto body shops, and what they found was a lot of the owners and employees weren't playing by the rules. For more on the story, let's go to KRCR News Channel 7's Tony Botti. He's live. Tony?"

The newscast video shifts from the news set to an outdoor scene where Toni Botti responds: "Jennifer --- I'm standing in front of Wright's Auto Body and this is just one of eleven shops

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[1] Plaintiff attached a transcript and a DVD of the broadcast to his second amended complaint as exhibits. Our summary is taken from these exhibits.

in Shasta County to have had a worker arrested. Now --- their crime --- writing up false insurance estimates."

The video shifts again as a narrator explains: "Butte County fraud agents were busy Wednesday morning, handcuffing seven workers from seven different auto body shops. It was the end of a sting operation where an undercover officer had brought in a damaged car from an accident, which had a legitimate insurance claim --- only the customer wanted more. They asked the worker to bump up the estimate by including another dent which didn't happen in the accident. If the worker agreed, they were busted." During this explanation, the video shows an investigative officer, pans several photos of arrested individuals, and then shows two photographs of the damaged car used in the investigation.

As the narrator states: "DA Mike Ramsey says it should be a lesson for everyone[,]" the video switches to a press conference with Ramsey at a podium. Other officials are standing behind him in front of display boards containing the arrested suspects' photographs that have been previously shown. Ramsey states: "if they want to go and get someone to work on their car and commit insurance fraud, they're basically dealing with a thief."

The narrator continues as the video shifts to the display board for Shasta County, which includes plaintiff's photograph: "Meanwhile, Shasta County arrested twelve people, but DA Gerry Benito didn't want those people to overshadow the folks that didn't get in trouble." The video switches back to the podium

at the press conference where Benito says: "[inaudible] reward . . . we wanna punish those people that have violated the law, but we also want to acknowledge those people, those businesses, who follow the law and do things the right way."

The video again changes to show a worker repairing a car and then to a view of the outside of an auto body shop. The voice narrating the story says: "Pioneer Auto Body, in Oroville, passed the undercover officer's test. Owner John Nolind says padding an estimate is something he gets asked all the time. He says you just have to learn to say no, and walk away." The video moves to an interview with Nolind who says: "No, it -- it hurts everybody, it hurts the insurance companies with higher rates, and, it gives the collision repair industry an unnecessary black eye for stuff like this."

The story concludes with reporter Botti stating that those who "were arrested face huge fines, but the Bureau of Automotive Repair can also take action, possibly suspending these businesses' licenses. Reporting live in Redding, this is Tony Botti for KRCR, news channel seven."

Plaintiff's second amended complaint alleged Scarborough and Botti defamed him in their news story and that California Broadcasting, Inc., doing business as KRCR channel seven, was negligent in allowing the defamatory broadcast.

The trial court sustained defendants' demurrer without leave to amend "on the ground that the absolute privilege contained in Civil Code section 47[, subdivision] (e) applies to all causes of action in this case." The court found "the

broadcast was a 'fair and true' report of the events relayed at the press conference, within the meaning of the statute." The trial court granted defendants' special motion to strike (§ 425.16), concluding the acts by defendants were "in furtherance of their rights of petition or free speech in connection with a public issue - the reporting of information disseminated at a press conference held by the [CDI] and law enforcement agencies[]" and that plaintiff had "no probability of succeeding on any of his claims in the second amended complaint" in "light of the court's prior ruling sustaining the demurrer without leave to amend[.]"

DISCUSSION

I.

Preliminary Matters

Plaintiff's notice of appeal states that he is appealing "from the Order entered on February 15, 2008." The order granting defendants' special motion to strike was entered on that date. Such order is made appealable under Code of Civil Procedure section 904.1 by subdivision (i) of section 425.16.

Plaintiff's notice of appeal also states he is appealing "from the Order entered on December 31, 2007." The order sustaining defendants' demurrer without leave to amend was entered on that date. An order sustaining a demurrer is not appealable; the appeal must be taken from the ensuing judgment. (*Casterson v. Superior Court* (2002) 101 Cal.App.4th 177, 182; *Setliff v. E.I. Du Pont de Nemours & Co.* (1995) 32 Cal.App.4th 1525, 1533.) Plaintiff's notice of appeal does not state that

he appeals from the judgment, although it was entered prior to the filing of his notice of appeal. Based on this, defendants ask us to disregard plaintiff's brief to the extent it addresses the sustaining of the demurrer. We decline defendants' request.

"An order sustaining a demurrer is interlocutory and thus not appealable. Any appeal must be taken from the subsequently entered judgment of dismissal. [Citations.] However, a notice of appeal must be 'liberally construed in favor of its sufficiency.' (Cal. Rules of Court, [former] rule 1(a) [see now rule 8.100(a)(2)].) In accordance with that mandate, a notice of appeal which erroneously purports to appeal from an order sustaining a demurrer will be deemed to be sufficient if (1) a judgment of dismissal was actually entered either before or after the filing of the notice of appeal, (2) there is no doubt as to which ruling the appellant seeks to have reviewed, and (3) the respondent could not possibly have been misled to its prejudice. [Citation.]" (*Forsyth v. Jones* (1997) 57 Cal.App.4th 776, 780.)

While plaintiff's notice of appeal refers to the order sustaining the demurrer, it was filed after the judgment was entered in defendants' favor. There is no confusion as to the scope of the appeal or possible prejudice to defendants. Under the liberal construction of the notice of appeal, we find the notice of appeal sufficient.

II.

The Trial Court Did Not Err In Sustaining Defendants' Demurrer Without Leave To Amend

Because this appeal is taken from a demurrer sustained without leave to amend, we presume the truth of all material facts properly pled in the complaint, but not contentions, deductions, or conclusions of law. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126; *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967 (*Aubry*).) "We accept as true both facts alleged in the text of the complaint and facts appearing in exhibits attached to it." (*Mead v. Sanwa Bank California* (1998) 61 Cal.App.4th 561, 567.) The judgment must be affirmed if any of the grounds for demurrer is well-taken. However, it is error to sustain a demurrer if the plaintiff has stated a cause of action on any possible legal theory. And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows a reasonable possibility of curing any defect in the complaint by amendment. (*Aubry, supra,* at p. 967; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

Plaintiff's second amended complaint alleges news reporter Botti and news anchor Scarborough defamed him in the story broadcast on the evening of his arrest. His cause of action against California Broadcasting, Inc. alleges its negligence in allowing the defamatory broadcast. Thus, defamation is the basis of all of plaintiff's claims. To prevail on a defamation cause of action, a plaintiff must prove the following elements: "the intentional publication of a statement of fact which is

false, *unprivileged*, and has a natural tendency to injure or which causes special damage." (*Ringler Associates Inc. v. Maryland Casualty Co.* (2000) 80 Cal.App.4th 1165, 1179, italics added; accord, *Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 27.)

Civil Code section 47 (section 47) sets forth a number of privileges that bar defamation liability for statements made in specified situations. Pursuant to section 47, subdivision (e), one of the situations is a publication or broadcast making "a fair and true report of (1) the proceedings of a public meeting, if the meeting was lawfully convened for a lawful purpose and open to the public, or (2) the publication of the matter complained of was for the public benefit." (Hereafter § 47(e).) A publication falling within the terms of section 47(e) is absolutely privileged and there is no liability even if the publication was made maliciously. (See *Williams v. Daily Review, Inc.* (1965) 236 Cal.App.2d 405, 418 [considering § 47, subd. (5), the predecessor numbering for § 47(e); Stats 1979, ch. 184, § 1], overruled on a different point in *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 732, fn. 18.)

If there is no liability for a publication that is privileged under section 47(e) despite actual malice, there certainly can be no liability based on mere negligence in the making of the statements. Therefore, we do not consider plaintiff's argument that defendants' were professionally negligent in their reporting of the insurance fraud investigation and plaintiff's arrest. The determinative issue is whether the privilege under section 47(e) applies.

In this case, the defendants' news broadcast was based on and covered a press conference held by the CDI in conjunction with the Butte and Shasta County District Attorney's Offices regarding the results of their undercover investigation into insurance fraud by auto body shops. The parties do not dispute the press conference was a public meeting within the meaning of section 47(e). (*Kilgore v. Younger* (1982) 30 Cal.3d 770, 796 (*Kilgore*).) Plaintiff admits the broadcast concerned a public issue. We agree. Government investigation of insurance fraud is plainly a matter of public concern and interest. Plaintiff strenuously argues, however, the report was not "fair and true." Contrasting the broadcast to the press release issued by the CDI regarding the investigation,[2] which announced the arrests of 19 "suspects" who were "allegedly" involved in fraudulent insurance claims, plaintiff complains that the broadcast never referred to those arrested as "suspects" or persons "suspected" of insurance fraud or that it was "alleged" they had committed insurance fraud. Plaintiff contends the report was sensationalized and failed to accord him the presumption of innocence.

A "fair and true" report is one which captures the substance, the gist or sting, of the proceeding. (*Kilgore, supra*, 30 Cal.3d at p. 777; *Colt v. Freedom Communications, Inc.* (2003) 109 Cal.App.4th 1551, 1558 (*Colt*); *Handelsman v. San*

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[2] Plaintiff attached the press release to his complaint as an exhibit. It may be appropriately considered as part of the complaint in considering defendants' demurrer. (See *Mead v. Sanwa Bank California, supra,* 61 Cal.App.4th at p. 567.)

Francisco Chronicle (1970) 11 Cal.App.3d 381, 386-387 (*Handelsman*).)[3] The publication is to be measured by the natural and probable effect it would have on the mind of the average reader in the community where the matter was published. (*Kilgore, supra,* at p. 777; *Handelsman, supra,* at p. 387.) "'The news article need not track verbatim the underlying proceeding. Only if the deviation is of such a "substantial character" that it "produce[s] a different effect" on the reader will the privilege be suspended.' [Citation.]" (*Carver v. Bonds* (2005) 135 Cal.App.4th 328, 351, quoting *Crane v. The Arizona Republic* (9th Cir. 1992) 972 F.2d 1511, 1519; *Colt, supra,* at p. 1558.) Reporters are allowed a "certain degree of flexibility/literary license" under the privilege. (*Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 262, fn. 13.) The "fair and true" standard "does not require the reporter to resolve the merits of the charges, nor does it require that he present the [plaintiff's] version of the facts." (*Rollenhagen v. City of Orange* (1981) 116 Cal.App.3d 414, 427,

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[3] The "fair and true" requirement for the section 47(e) privilege has been considered the same as the "fair and true" requirement in section 47, subdivision (d), which makes privileged a "fair and true report" in a public journal of a judicial, legislative, or other public official proceeding or comments made during the course of such proceedings or charges or complaints made to a public official upon which a warrant has issued. (§ 47, subd. (d); *Dorsey v. National Enquirer, Inc.* (9th Cir. 1992) 973 F.2d 1431, 1436, fn. 4.) Therefore, we rely on case law regarding the "fair and true" requirement under either privilege without distinguishing them.

disapproved on another ground in *Brown v. Kelly Broadcasting Co., supra,* 48 Cal.3d 711, 738.)

When there is no dispute as to what occurred in the proceeding reported upon, or as to what was contained in the report and all reasonable inferences from those facts lead to the same conclusion, the decision of whether the report is fair and true is one of law. (*Dorsey v. National Enquirer, Inc., supra,* 973 F.2d 1431, 1436; *McClatchy Newspapers, Inc. v. Superior Court* (1987) 189 Cal.App.3d 961, 976.)

We conclude the broadcast was a fair and true report as a matter of law when viewed as a whole, considering both the text and visual components of the broadcast together. (*Monterey Plaza Hotel v. Hotel Employees & Restaurant Employees* (1999) 69 Cal.App.4th 1057, 1064-1065; *Blake v. Hearst Publications, Inc.* (1946) 75 Cal.App.2d 6, 11.) The broadcast started with the statement that 19 "people in local auto repair businesses *will have to take a day off of work to go to court after they were arrested* for insurance fraud." (Italics added.) The broadcast did not say each arrested individual was or would necessarily be found guilty, only that they would have to defend themselves in court. (Plaintiff admits he was arrested and he did have to go to court, where he was ultimately vindicated.) The broadcast went on to relate the nature of the undercover investigation, the results of the investigation reported at a press conference, and the opinions of several individuals about the seriousness and prevalence of people asking repair shops to commit this kind of fraud. The broadcast concludes with the statement that those

arrested "face" huge fines and the Bureau of Automotive Repair "can" also take action, "possibly" suspending their business license.

Any reasonable viewer would have understood from the broadcast that the story was about people who had been arrested as a result of a law enforcement investigation, which was made public at a press conference. In context, the statement by Scarborough that "what they found was a lot of owners and employees weren't playing by the rules" would have been understood as representing what the investigators claimed to have found. The same is true of Botti's statement: "Now --- their crime --- writing up false insurance estimates."[4] This

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[4] In arguing the broadcast defamed him, plaintiff's brief references the trial court's discussion of these statements by Scarborough and Botti in a tentative ruling on the defendants' demurrer and motion to strike one of plaintiff's earlier complaints. In response to defendants' objection in their brief that the ruling is not part of the trial court's file or record, plaintiff requests augmentation of the record to include the minutes of the trial court showing its adoption of the tentative ruling. (Cal. Rules of Court, rule 8.155(a).) Plaintiff also requests judicial notice of the tentative ruling, the court minutes, the formal order on defendants' demurrer, and the trial court's docket. (Cal. Rules of Court, rule 8.252(a).) Plaintiff asserts the formal order entered does not reflect the entirety of the tentative ruling due to improper conduct by counsel for defendants in improperly preparing the final order sustaining the demurrer to the earlier complaint. Plaintiff asks that we make such a finding and order the trial court to vacate its order and adopt a new order containing all the language of its tentative ruling. Defendants oppose plaintiff's requests and deny any improper conduct. We decline to enter this fray. The trial court's comments in a ruling on an earlier demurrer addressing a different issue than privilege are not relevant or material to the issues before us on appeal. We deny

becomes even clearer as the story progresses to show the press conference hosted by the CDI and law enforcement. It is plain that the broadcast story was merely reiterating allegations made at the press conference. The District Attorney for Butte County and the District Attorney for Shasta County both spoke in general terms about this kind of fraud. They did not make any comments regarding any of the individuals arrested.

News stories about individuals arrested for various criminal offenses, followed by stories of the investigation and their subsequent trials, are so common today that we are confident it is generally understood by viewers that arrest is not equivalent to guilt. The constitutional presumption of innocence is well known and frequently referenced in books, movies and on television. Moreover, to the extent there may still be people that believe a person who is arrested must be guilty, such people are unlikely to have their view changed because a news report refers to the arrested person as a "suspect" or to the charges as "alleged." While the media should be mindful of using those terms, the failure of the broadcast here to include the qualifiers "suspects" or "suspected" or "alleged," so as to mirror the language used in portions of the CDI press release, was not a difference "'of such a "substantial character" that it "produce[s] a different effect" on the reader[.]'" (*Carver v. Bonds, supra,* 135

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plaintiff's motion for augmentation and request for judicial notice.

Cal.App.4th at p. 351.) The broadcast accurately relayed the substance, the gist or sting, of the press conference by law enforcement and CDI announcing the results of its investigation, which included plaintiff's arrest. (*Kilgore, supra*, 30 Cal.3d at p. 777.)

The trial court did not err in concluding the statements made during the broadcast were absolutely privileged under section 47(e). There was no actionable defamation by defendants.

Given this conclusion, the trial court properly sustained defendants' demurrer to all three causes of action alleged by plaintiff that were premised on the broadcast being defamatory. (*Jennings v. Telegram-Tribune Co.* (1985) 164 Cal.App.3d 119, 129.) Moreover, as plaintiff has not shown any ability to amend his complaint to show the privilege inapplicable, we cannot conclude it was error to sustain the demurrer without leave to amend.

III.

The Trial Court Did Not Err In Granting Defendant's Section 425.16 Motion

Section 425.16, the anti-SLAPP statute, is designed to "encourage continued participation in matters of public significance," and to prevent such participation from being "chilled through abuse of the judicial process." (§ 425.16, subd. (a).) The statute provides, in pertinent part, "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech

under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (*Id.*, subd. (b)(1).)

An "'act in furtherance of a person's right of petition or free speech'" includes as relevant here: "(3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e).)

The trial court employs a two-step process in resolving an anti-SLAPP motion. First, it determines whether the cause or causes of action being challenged arise from a protected activity as described in the statute. Second, if the court so finds, it then determines whether the plaintiff has established a probability of prevailing on the merits (*Maranatha Corrections, LLC v. Department of Corrections & Rehabilitation* (2008) 158 Cal.App.4th 1075, 1084), i.e., whether the complaint is legally sufficient and plaintiff has shown facts that would, if proved at trial, support a judgment in plaintiff's favor. (*Taus v. Loftus* (2007) 40 Cal.4th 683, 713-714; *Gilbert v. Sykes, supra,* 147 Cal.App.4th at p. 22.) On appeal, we independently review the trial court's rulings using the same

two-step inquiry. (*Lieberman v. KCOP Television, Inc.* (2003) 110 Cal.App.4th 156, 163-164 (*Lieberman*).)

Turning to the first question, we conclude plaintiff's causes of action, which are based on defendants' television news broadcast of a story about a governmental investigation of insurance fraud that resulted in multiple arrests, are causes of action based upon activity protected by section 425.16. "Reporting the news is speech subject to the protections of the First Amendment and subject to a motion brought under section 425.16, if the report concerns a public issue or an issue of public interest. [Citations.] Major societal ills are issues of public interest. [Citation.] News reports concerning current criminal activity serve important public interests. [Citation.]" (*Lieberman, supra,* 110 Cal.App.4th at p. 164.) Statements that relate to matters of widespread public interest that contribute in some manner to the public discussion of the topic are also issues of "public interest" within the meaning of section 425.16, subdivision (e)(3) and (4). (*Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1347.) Surely, there can be no disagreement that defendant's broadcast concerned a public issue or interest. Defendants' news report of the results of an undercover investigation of insurance fraud by auto body shops padding estimates concerns a major societal ill and criminal activity; it contributes to public discussion of a matter of widespread public interest.

Condit v. National Enquirer, Inc. (E.D. Cal. 2002) 248 F.Supp.2d 945, cited by plaintiff, is inapposite. In *Condit,*

the defendant published false stories accusing the wife of United States Congressman Gary Condit of verbally attacking her husband's intern, Chandra Levy, just before her disappearance. (*Id.* at p. 948.) The federal court denied defendant's section 425.16 motion on the ground that it was not being sued for making statements relating to a "public issue" or "issue of public interest." (*Id.* at pp. 953-954.) The court stated "[i]t would be absurd to suppose that a newspaper can generate a public issue by the mere fact of printing a story, even when it expects lively interest among its readers." (*Ibid.*) It concluded section 425.16 applied only if the articles could "be characterized as statements made in connection with an issue of public interest for reasons other than that they were made in a widely distributed publication." (*Id.* at p. 954.) There were no such other reasons in *Condit*. (*Ibid.*) Accepting as true the well-pled allegations of the complaint, the court found plaintiff could succeed on the merits of her defamation action. (*Ibid.*) Defendant essentially manufactured a salacious defamatory story that was not entitled to protection.

In contrast here, defendants' broadcast covered a press conference presented by the CDI and law enforcement regarding a governmental investigation into insurance fraud. Defendant's broadcast was protected activity for purposes of section 425.16.

Turning to the second prong of the inquiry under section 425.16, it is clear plaintiff cannot prevail on the merits of his defamation action because, as we have already discussed, defendants' broadcast was a fair and true report of the press

conference regarding the investigation and its results entitling defendants to the absolute privilege of section 47(e).[5]

The trial court did not err in granting defendants' special motion to strike under section 425.16.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondents. (Cal. Rules of Court, rule 8.278(a)(1).)

CANTIL-SAKAUYE, J.

We concur:

HULL, Acting P. J.

ROBIE, J.

[5] Plaintiff advances the argument that section 425.16 cannot be so broadly construed as to "abrogate [his] constitutional right to redress for a defamation." Plaintiff's argument presumes defendants defamed him, but we have concluded plaintiff's complaint alleges no actionable defamation. Thus, we do not interpret section 425.16 in a way that denies plaintiff redress for defamation.